A Brief Introduction

TO

AUSTIN'S

Theory of Positive Law and Sovereignty

BY

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LONDON:
SWEET & MAXWELL, LIMITED
3 CHANCERY LANE

TORONTO, CANADA:
THE CARSWELL CO. LIMITED
19 DUNCAN STREET

SYDNEY, N.S.W.:
LAW BOOK OF AUSTRALASIA, LIMITED
ELIZABETH STREET

1916.

PRINTED BY
THE EASTERN PRESS, LTD.,
LONDON AND READING, ENGLAND.

PREFACE

NINE out of every ten students who take up the study of Jurisprudence are set to read Austin. Yet it can hardly be said that the result is always satisfactory. The student who is at the outset of his legal studies, as the vast majority of students of Jurisprudence are, comes with deference to a subject of which he knows little or nothing, and he accepts easily enough the masterful arguments of Austin. And then, after a time, comes a complete revulsion. As soon as he begins to extend his reading, he finds that Austin's views are not universally held. In fact, most of the writers whose books he reads have some criticisms of Austin to make. The student finds the views he has accepted as true are open to objection; and, not unnaturally, he goes to the opposite extreme. He treats the Austinian doctrines as matters to be dismissed with a contemptuous shrug, and he mistakes abuse for criticism.

Much of this might be avoided if he could but start with the knowledge that Austin's views are not perfect, and with some idea of the various criticisms levelled against them, if he could realise at the beginning that Austin's work

does not now stand alone, but is more properly to be surveyed in connection with the volume of criticism and counter criticism to which it has given rise.

Accordingly I have endeavoured in this small work to give a brief summary of the more essential portions of Austin's Theory of Positive Law and Sovereignty (for that is the part of his work which has caused most discussion), together with a summary of the various views and discussions which it has provoked. On the ground that the book is intended only for those about to take up the study of Jurisprudence for the first time, I have deemed it advisable to add an introductory chapter, dealing with the meaning of Jurisprudence and giving a biographical sketch of Austin.

The references do not pretend to be exhaustive. Such books only are referred to as the student will be able to find on the shelves of a moderately well-equipped library.

I have, it goes without saying, derived assistance from many authors, but to none am I more indebted than to Dr. Jethro Brown whose "Austinian Theory of Law" has been a source of considerable help.

The edition of Austin used is the Fifth.

R. A. E.

MANCHESTER :
February, 1916.

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CHAPTER I.

INTRODUCTORY.

JURISPRUDENCE is one of the Social Sciences. By Social Sciences are meant all those sciences which deal with the relations of men living together in an organised society. These relations may be studied from several points of view, and the knowledge derived from the study of each point of view, when properly co-ordinated, forms a distinct Social Science.

A person may, in the first place, study the general principles underlying man's thought and action at all stages of social development and in every relation of life. The science which he would be studying in that case is called Sociology.

Secondly, he may study the moral considerations and principles which affect man's conduct and which constitute his standard of right and wrong. He is then studying the Science of Ethics.

In the third place, he may study the principles underlying man's mental states and processes, his emotions, thoughts, memories, perceptions, and sensations. In such a case, he is studying the Science of Psychology.

body or department of law. Jurisprudence is a science. It has been defined as "the science of Law in general."[2] In other words, it deals with the general ideas and conceptions, the fundamental and pervading principles, that underlie or form the bases of all or most systems of law among nations that have attained to an appreciable degree of order or civilisation.

A little reflection will shew that although the rules of law in modern States differ greatly, yet the fundamental principles and ideas underlying the rules of law present a marked similarity. In every State that has attained to any adequate degree of independence and organisation there will be found both agriculture and manufactures, and both agriculture and manufactures imply property or ownership; they also imply agreements or contracts, such as those between master and servant, buyer and seller, and the like. Moreover, social conditions imply the fact of marriage, and hence arise domestic relations, such as those between husband and wife, parent and child, and so on. Also, some members of the community are always found to lag behind the rest, and to commit acts of violence which, directly or indirectly, threaten the existence of the State. Such acts are called crimes. With these and other similar facts, and with numerous relationships rising out of them, the law always deals. The study of Jurisprudence, therefore, is the scientific study of these legal facts and

2. Clark, *Practical Jurisprudence*, p. 1.

relationships which are common to all developed systems of law.[3]

The relation between Jurisprudence and Law is likened by Professor Holland to the relation between language and grammar. In form languages differ greatly from one another; there are great differences in vocabulary, in accidence, and in syntax. But, despite these differences in form, the purpose of all language is just the same. The purpose of language is to provide a mode of expression for men's thoughts and feelings, and, since men's thoughts and feelings are fundamentally the same among all races, the various languages by which they are expressed must likewise exhibit a similarity. In the same way, although the actual rules of the various legal systems differ very much, yet the relations which they have been established to govern present a marked similarity.

Now a person sufficiently skilled might use the ideas and feelings which are expressed in all languages as the subject of a special science. He might, for instance, take the comparison of adjectives and adverbs. The method of forming the comparative and superlative degrees from the positive is different in different languages. Some languages form them by altering the termination of the word; others by prefixing fresh words. In English we say, "tall, taller, tallest." But a Frenchman would say, "*grand, plus grand, le plus grand.*" Yet, although the

3. See Amos, *Science of Law*, pp. 13-19.

forms differ, the relation expressed is in each case the same.

Now, if a person were to collect and compare the forms used in different languages to render the degrees of comparison, he would be working on a science which is called Comparative Philology. If, however, he were to expound the common relations which the various comparative and superlative forms used in different languages are intended to express, his exposition would form part of a science which would probably be called Abstract Grammar.

Similarly in the realm of legal study there is a science which corresponds to Comparative Philology. It is called Comparative Law, and its function is to "collect and tabulate the legal institutions of various systems."[4] There is also a science which corresponds to Abstract Grammar. It is the science of Jurisprudence, and Jurisprudence might be called Abstract Law. Its function is "to set forth an orderly view of the ideas and methods which have been variously realised in actual systems."[5]

It is probable that the student who takes up this book will be preparing himself for a career at the Bar or as a solicitor, and he will doubtless be asking why it is that he, who intends to take up the practice of Law, should be faced at the commencement of his professional studies with

4. Holland, *Jurisprudence*, p. 8.

5. *Ibid.* For the above explanation of Holland's meaning I have drawn largely on Mr. Goadby's *Introduction to Law*, pp. 6-7.

this abstract science of Jurisprudence. The answer is this: If he studies general legal ideas, he will much more easily be able to comprehend the concrete rules which later he will have to apply. He will come to the study of English Law prepared by a knowledge of certain principles which underlie it, and he will have a clear idea of the meaning of legal terms. This is not the only use, nor is it by any means the most important use, of the study of Jurisprudence. It simply explains the value of the study of the elementary portions of Jurisprudence at the commencement of a legal education. To the student who has mastered the concrete rules of any actual system of law, such as English Law, the study of Jurisprudence in a more advanced form will have wider and more important uses,[6] but with these a book for beginners is not concerned.

The man who may be regarded as the founder of Jurisprudence in England is John Austin. Austin, who was the eldest son of a flour miller of Ipswich, was born in 1790. At the early age of sixteen he entered the Army, and served for a little over five years in Malta and Sicily. He appears to have liked his profession; but, in spite of his military duties and his participation in the pleasures of his brother officers, he yet found time for a considerable amount of serious reading. Resigning his commission in 1812, he commenced to study law, and was called to

6. See Clark, *Roman Private Law*, Part II. vol. i. pp. 10-16.

the Bar by the Inner Temple in 1818. He joined the Norfolk Circuit, but weak health and a highly-strung and sensitive nature made him but an indifferent practitioner, and he retired from practice in 1825.

In the following year Austin's real work may be said to have begun. The University of London (now University College) had just been formed, and Austin was offered the chair of Jurisprudence there. Not being called upon to commence his duties immediately, he proceeded to Germany for the purpose of studying the method of legal teaching employed at the German universities. This visit had considerable influence on Austin's mental development,[7] and yet it can hardly be said that it influenced to any considerable degree his treatment of the subject of Jurisprudence. The Germans have always employed the Metaphysical Method[8] in legal science, but the metaphysical was the one aspect of German thought with which Austin had not the slightest sympathy. His method was essentially English. Instead of mingling ethics and metaphysics with law, he went to almost excessive trouble to discriminate between the province of law and the province of morality.

In 1828 Austin entered upon his professorial duties, and commenced to lecture to a class remarkable for the number of its members who afterwards distinguished themselves in law, in

7. See J. S. Mill, *Autobiography*, pp. 176-179.

8. See Bryce, *Studies in History and Jurisprudence*, vol. ii. pp. 174-178.

politics, and in philosophy. Sir George Cornewall Lewis, Charles Buller, Charles Villiers, Sir Samuel Romilly, and his brother, Lord Romilly, Sir William Erle, and J. S. Mill were all among his students, and there is evidence that his lectures were deemed valuable by his hearers.

But there was no fixed stipend attached to the chair, and the case was one in which quality could not entirely take the place of quantity as regards the number of the students, and in 1832 pecuniary difficulties forced Austin to resign. In the same year he published what is regarded as the most valuable portion of his work, "The Province of Jurisprudence Determined," a book consisting of the first ten lectures delivered at University College, and re-arranged in the form of six lectures, the main portions of which it is the object of the following chapters to discuss.

The next year Austin obtained further work "of the kind . . . for which he is best fitted." [9] A Commission was appointed to draw up a digest of the criminal law and procedure, and of this Commission Austin was made a member. Although he regarded it as his duty to sign the report, he does not seem to have been satisfied with it. He thought a complete re-casting of the law in the form of a code far more useful.[10]

Before long Austin was again lecturing. In 1834 he was appointed by the benchers of the

9. *Letters of J. S. Mill* (Ed. Elliot), vol. i. p. 57.

10. See Austin, *Jurisprudence* (Mrs. Austin's Preface), pp. 10-11.

Inner Temple to deliver a course of lectures on "The General Principles of Jurisprudence and International Law"; but the attendance was again small, and when only a few lectures had been delivered the course was suspended. After this second failure Austin finally abandoned the work of a teacher of Jurisprudence.

About eighteen months later he was appointed Royal Commissioner, along with Sir George (then Mr.) Cornewall Lewis, to visit Malta and enquire into the grievances of the natives of that island. At Malta he remained for about three years, after which he lived much abroad until 1848, when he finally settled at Weymouth, where he died in 1859. Shortly before his death he published "A Plea for the Constitution." It was an answer to Lord Grey's Essay on Parliamentary Government. Austin held that the consequences to be attributed to Parliamentary reform were all either impossible or dangerous. The people, he said, would not make proper use of political power; political power was best in the hands of those possessing hereditary or acquired property. This was Austin's last work; shortly afterwards he died.

John Stuart Mill, who knew Austin intimately, says of him:[11]

"He was a man of great intellectual powers which in conversation appeared at their very best; from the vigour and richness of expression with which, under the excitement of discussion,

11. *Autobiography*, pp. 74-75.

he was accustomed to maintain some view or other of most general subjects; and from an appearance of not only strong, but deliberate and collected will; mixed with a certain bitterness, partly derived from temperament, and partly from the general cast of his feelings and reflections. . . . With great zeal for human improvement, a strong sense of duty, and capacities and acquirements the extent of which is proved by the writings he has left, he hardly ever completed any intellectual task of magnitude. He had so high a standard of what ought to be done, so exaggerated a sense of deficiencies in his own performances, and was so unable to content himself with the amount of elaboration sufficient for the occasion, that he not only spoilt much of his work for ordinary use by over-labouring it, but spent so much time and exertion in superfluous study and thought that when his task ought to have been completed, he had generally worked himself into an illness without having half finished what he undertook. From this mental infirmity . . . combined with liability to frequent attacks of disabling though not dangerous ill-health, he accomplished, through life, little in comparison with what he seemed capable of; but what he did produce is held in the very highest estimation by the most competent judges; and, like Coleridge, he might plead as a set-off that he had been to many persons, through his conversation, a source not only of much instruction but of great elevation of character."

It is, however, with the somewhat narrower question of the value of Austin's contribution to the science of Jurisprudence that we are now chiefly concerned. After Austin's death two volumes were published, containing all that could be put together of his hitherto unpublished work. Along with "The Province of Jurisprudence Determined," these make up the first important English book on the subject of Jurisprudence. Austin once said of himself that his special intellectual vocation was that of "untying knots";[12] and authorities are almost unanimous that his chief work in the field of Jurisprudence has been that of clearing away many false ideas which obscured the true meaning of law and legal terms. His works, to use Sir Henry Maine's words, "are indispensable, if for no other object, for the purpose of clearing the head."[13] Before Austin's time very little distinction was drawn between the moral and the legal meanings of such words as law, right, duty, and the like; and it was often said that the law of God, the law of Nature, and moral considerations could override the law of the State. Austin shewed clearly that, whatever might be thought of such a view morally, it could have no application legally. His work is not without faults. It is marked especially by frequent irrelevance which has caused some critics to misunderstand him. As a follower of Bentham, he was an enthusiastic advocate

12. J. S. Mill, *Dissertations and Discussions*, vol. iii. p. 207.
13. Maine, *Early History of Institutions*, p. 343.

of the principle of Utility, the principle that law should aim at "the greatest happiness of the greatest number." This theory has nothing at all to do with Jurisprudence which, in the method Austin adopted, aims at the analysis and classification of legal conceptions. It has to do with the making of law, and belongs, therefore, to the Science of Legislation. Not only does Austin thus find room in a work on Jurisprudence for a doctrine which has no proper place there. He goes further. In "The Province of Jurisprudence Determined" he distinguishes the law of the State, which he calls Positive Law and describes as the proper subject-matter of Jurisprudence, from various other objects to which the term law is applied, including the law of God. He identifies the law of God with Utility and then, in a book consisting only of six lectures, he devotes three lectures to its discussion and wanders into the field of Natural Theology. Austin censures Roman lawyers for assuming the existence of a so-called law of Nature, but he himself, on account of the above-mentioned faults, has been described by German critics as the author of "theories of Natural Law." A glance, however, at Austin's definition of Positive Law, the only law which he recognises as coming within the province of Jurisprudence, will at once shew that Austin was no advocate of any supposed natural law, above and superior to the law of the State. "Every positive law," he says, "is set by a sovereign person, or a sovereign body

of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme."[14] Such laws only does he recognise as coming within the province of Jurisprudence. Austin was not the first to maintain such a doctrine. It had already been put forward by Hobbes and by Bentham, to both of whom Austin owed much. Nevertheless, it was in Austin's work that the doctrine had most effect, and it is largely owing to him that the idea of a law of Nature, at one time so popular in England, has been altogether abolished from English thought. Since Austin's time, no responsible writer has said, as Blackstone once said: "the law of Nature is binding over all the globe in all countries: no human laws are of any validity if contrary to this."[15]

14. *Jurisprudence*, p. 220.
15. *Commentaries*, Introduction, p. 43.

CHAPTER II.

THE NATURE OF POSITIVE LAW.

(*a*) *Austin's Theory.*—Jurisprudence has been defined as the science of law in general, and the meaning of this definition was explained in the last chapter. The next task is to obtain a true idea of the meaning and nature of law.

It was in this connection that the most important part of Austin's work was done. Austin says that the proper subject-matter of Jurisprudence is Positive Law—that is, law simply and strictly so-called. But, he points out, the word "law" as used in ordinary speech has many significations. Sometimes it is used properly; sometimes it is not, and is extended by analogy or metaphor. He says that a law, in the widest sense in which the term may properly be used without any extension by analogy or metaphor, means "a rule laid down for the guidance of an intelligent being by an intelligent being having power over him."[1] Laws, in this sense, are divisible into two main classes, namely:

(1) Laws set by God to men, which Austin calls the Divine Law, or the Law of God; and

1. *Jurisprudence*, p. 86.

(2) Laws set by men to men, which he calls Human Laws.[2]

Human laws are further divisible into two classes—namely:

(x) Laws set by political superiors acting as such, or by men not acting as political superiors but acting in pursuance of legal rights conferred by political superiors. To the aggregate of such laws Austin gives the name of Positive Law—law simply and strictly so-called and, therefore, the proper subject-matter of Jurisprudence.[3]

(y) Laws or rules set by men who are not political superiors, or who are not acting in the capacity or character of political superiors or in pursuance of legal rights.[4]

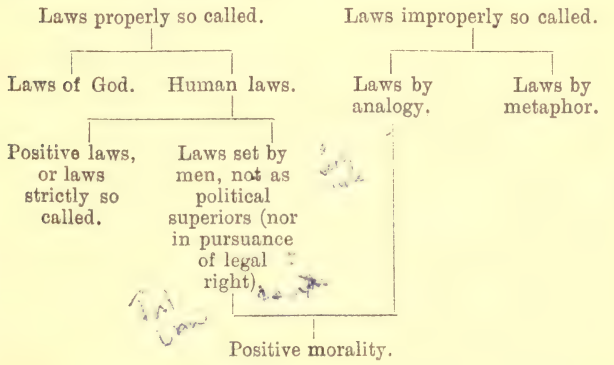
Also, he says, closely analogous to human laws of this latter class are a number of objects to which the name "law" is given improperly, but by close analogy. They are rules set by the mere opinion or sentiment of an indeterminate body of men—such, for example, as the rules which make up what are known as the law of honour, the law set by fashion, and the like. Along with these Austin includes the rules which are known as International Law, because, in his view, "International Law" consists of "opinions or sentiments current among nations generally."[5]

2. *Jurisprudence*, p. 86.
3. *Ibid.* p. 87.
4. *Ibid.* p. 87.
5. *Ibid.* p. 87.

These objects, which are called "laws" improperly, but by close analogy, Austin classes along with human laws of class (*y*) above—that is, laws set by men not as political superiors and not acting in pursuance of legal rights—and to the combined class he gives the name of Positive Morality.[6]

Finally, he points to a fourth class of objects, to which the name "law" is only applied metaphorically or by a figure of speech. In this class are included the various so-called "laws" which are spoken of in the natural sciences, such as the laws observed by the lower animals, the laws regulating the growth or decay of vegetables, and the laws determining the movements of inanimate bodies or masses.[7]

The whole analysis may be expressed by means of the following table: [8]



6. *Jurisprudence*, p. 87.

7. *Ibid.* p. 88.

8. This table is taken from W. Jethro Brown, *The Austinian Theory of Law*, p. 4.

Having thus distinguished between the various objects to which the term "law" is applied, properly or improperly, Austin proceeds to state the essentials of a law or rule, taken in the widest sense in which the term may properly be employed—namely, "a rule laid down for the guidance of an intelligent being by an intelligent being having power over him." He says that all laws or rules are a species of commands. A command he regards as the expression or intimation of a wish by one person that another person shall do or forbear from some act, when the person expressing the wish has the power and the purpose to inflict an evil or penalty on the other person in case of disobedience. This power and purpose to inflict a penalty for disobedience are of the very essence of a command; they distinguish a command from all other significations of desire.[9] The person liable to the evil or penalty is said to be bound or obliged by the command; in other words, he is under a duty to obey it.[10] The evil or penalty to be incurred by disobedience is called a sanction or enforcement of obedience.[11] Command, duty, and sanction are, therefore, inseparably connected terms. Each denotes a different part of the same notion, and brings to mind the others.[12]

9. *Jurisprudence*, p. 89.
10. *Ibid.* pp. 89-91.
11. *Ibid.* p. 89.
12. *Ibid.* pp. 91-92.

Every law, in the widest sense in which the term may properly be used, is, according to Austin, a command imposing a duty and enforced by a sanction. But, although every law is a command, every command is not a law. Sometimes a command obliges only to a specific act or forbearance. In that case it is not a law, and Austin calls it a particular command.[13] Particular commands are not laws. A law, Austin says, is a command which obliges to acts or forbearances of a class.[14] It is a general command, a command which obliges to a course of conduct. The test of whether any given command is or is not a law, as understood by Austin, is the question, Does it, or does it not, oblige to a course of conduct?[15] If it does not, even though it may happen to be in the form of a law, it is not a law for purposes of Jurisprudence. For example, if the Parliament of Great Britain were to pass an Act providing that on one particular day every one should commence business two hours earlier than his usual time, that Act would be a particular command, not a law. It would not oblige to a course of conduct, but only to a specific act. On the other hand, if the Act provided that every one should, for the future, commence business two hours earlier, then it would be a law, because it would oblige to a course of conduct.

13. *Jurisprudence*, p. 92.
14. *Ibid.* p. 92.
15. See Jethro Brown, *Austinian Theory of Law*, pp. 17-20.

It requires but little reflection to convince one that Austin is justified in thus insisting on generality as essential to a law. In a modern state it is absolutely necessary that laws should be general in object. The State cannot deal with each particular case as it arises. It must deal with great classes of acts. Admittedly, cases do arise calling for particular action, but such action does not come within the science of law in general.[16]

On the other hand, Austin did not insist on generality of persons. It would have been more correct had he done so, however, for generality of persons is necessary for precisely the same reason as generality of acts—namely, in modern times the State cannot deal with individuals; it must deal with classes. Austin overlooked the fact that many laws, although apparently addressed to an individual, are really addressed to a class. An Act of Parliament, creating and granting a new office, and binding the grantee of it to duties of a particular description, affords a good example. Austin would call it a law "exclusively binding on a specified or determinate person."[17] But really, unless it be assumed that the office is to begin and end with one person, the statute is addressed to a class consisting of all those persons who shall occupy the office created.

16. See Maine, *Early History of Institutions*, p. 393; and W. Jethro Brown, *Austinian Theory of Law*, pp. 18-20.

17. *Jurisprudence*, p. 96.

An Act of Parliament which is addressed to a particular individual, or which does enjoin a definitely limited number of acts, is more properly described as an act of administration, not as a law. At one time divorces could only be obtained by means of an Act of Parliament; but it was held that the proceedings in Parliament were not true legislation, but were part of the judicial system.[18] Such Acts "assume the form, though not the nature of law." [19]

But, to return to Austin's theory: all laws he regards as general commands. Every command proceeds from a superior and binds an inferior; that is to say, it proceeds from a person who has the power of inflicting evil or pain, and it binds a person on whom he can inflict that evil or pain. Hence every law, being a command, emanates from a superior and binds an inferior.[20] But this view, Austin says, must be taken with certain limitations. There are three objects which are not commands, but which still come within the province of Jurisprudence—namely:

(1) Declaratory or Explanatory Laws. These are Acts which are passed to explain laws already in force. Austin does not regard them as commands because they work no change in the duties of the governed, but merely declare what those duties are. They are "Acts of interpretation by legislative authority." [21]

18. *Shaw* v. *Gould* (L. R. 3 E. & I. App. 86; 37 L. J. Ch. 433).

19. W. Jethro Brown, *Austinian Theory of Law*, p. 20.

20. *Jurisprudence*, pp. 96-97.

21. *Ibid.* p. 98.

(2) Laws to Repeal Laws and to release persons from existing duties. These again, in Austin's view, are not commands, but revocations of commands. They permit the parties concerned to do or to forbear from acts which formerly they were commanded to forbear from or to do. For this reason they are sometimes called Permissive Laws or Permissions.[22]

(3) Imperfect Laws or Laws of Imperfect Obligation. These are laws which have no sanction or enforcement of obedience attached to them. Such laws were known to the Roman jurists, but they do not exist in English law, because if the Legislature affects to command, but does not attach any sanction to the command, the Courts will always supply a sanction.[23]

Subject to these three exceptions, however, Austin holds that all laws, taking the term in the widest sense in which it may properly be used, are general commands.

It will be remembered that Austin defines a law, in the widest sense in which the term may be properly used, as "a rule laid down for the guidance of an intelligent being by an intelligent being having power over him." Such laws are divisible into two classes: (1) Laws set by God to men; and (2) laws set by men to men. Laws set by men to men are again divisible into two classes: (*a*) Positive laws, or laws set by men as political superiors or by men

22. *Ibid.* pp. 98-99.

23. *Ibid.* pp. 99-100. See also *Ashby* v. *White* (1 Smith L.C. p. 266)

as private persons acting in pursuance of legal rights; and (*b*) laws set by men not as political superiors and not in pursuance of legal rights.[24]

All these are general commands. They all have certain distinguishing characteristics. But positive laws, laws simply and strictly so called, and therefore the appropriate subject-matter of Jurisprudence, are, in Austin's view, characterised, and are distinguishable from all others, by the fact that every positive law is a direct or circuitous command of a sovereign person or a sovereign body of persons to a person or persons in subjection to its author.[25]

This is the essence of Austin's theory. Every positive law is the command of a Sovereign. The Sovereign may be large or small; it may be an oligarchy, an aristocracy, or a democracy. The law itself may be made directly by the Sovereign, it may be made by a person or body to whom the Sovereign has delegated some of its authority, or it may be made by a private person whom the Sovereign has invested with a legal right to make it, but it is in every case the express or tacit command of the Sovereign which makes it law. Every positive law is, according to Austin, the command of a Sovereign.

(*b*) *Criticisms of Austin's Theory.*—Austin's theory, which has just been outlined, has been subjected to very severe criticism; so much so, that if the theory had not contained an important

24. *Ante*, pp. 15-17.
25. *Jurisprudence*, p. 330.

element of truth it must long ago have entirely disappeared. Roughly, the criticisms which have been levelled against Austin's views may be divided into two classes—namely:

(1) Those which regard the historical source of law and deal with law in its earliest form; and

(2) Those which deal with the nature of law as it is to-day.

It is often said that Austin's theory is defective because it is inapplicable to law as it exists among primitive peoples. It has been shewn that the earliest terms in use for law meant not command, but, for the most part, usage or custom.[26] The daily lives of individuals in the infancy of society were regulated by a body of customs not attributable to any Sovereign or lawgiver, not obeyed from fear of any human punishment at all, but usually from dread of impersonal or supernatural sanctions. Such customs were obeyed before governments came into existence, and when the germs of the State appeared they still continued to regulate the lives of the people. The Sovereign was not the lawgiver. Sir Henry Maine draws a noteworthy example from the Punjab. That district, after passing through a long period of anarchy, fell under the dominion of a half-military, half-religious oligarchy called the Sikhs. The Sikhs themselves were afterwards reduced to subjection by Runjeet Singh, a chieftain belonging to their own order. "At first sight there could have

26. See Clark, *Practical Jurisprudence*, pp. 11-76.

been no more perfect embodiment than Runjeet Singh of sovereignty as conceived by Austin. He could have commanded anything; the smallest disobedience to his commands would have been followed by death or mutilation." Yet, with all this, Runjeet Singh was not a lawgiver. The lives of his subjects were regulated by their customary rules administered by domestic tribunals in families or village communities, not by commands imposed by Runjeet Singh.[27]

Such criticisms as this, however, are not to the point. They deal with rules which existed in the very remote past. Austin's theory is a theory of law as it exists in a mature state. "If there are any rules prior to, and independent of the State, they may greatly resemble law; they may be the primeval substitutes for law; they may be the historical source from which law is developed and proceeds; but they are not themselves law. There may have been a time in the far past when a man was not distinguishable from an anthropoid ape, but that is no reason for now defining a man in such wise as to include an ape. To trace two different things to a common origin in the beginnings of their historical evolution is not to disprove the existence or the importance of an essential difference between them as they now stand. This is to confuse all boundary lines, to substitute the history of the past for the logic of

27. Maine, *Early History of Institutions*, Lect. xiii.

the present, and to render all distinction and definition vain." [28]

Those criticisms of Austin's theory which deal with the nature of law as it exists to-day are much more serious. It is said that in a modern State there are many laws which cannot be expressed in the form a command, and that an undue straining of language is required to make them fit in with Austin's definition.

It is pointed out that much modern law is of a purely permissive character, and merely confers privileges. The law, for example, permits a man to make a will; it does not command him to do so. How can it be said that the rule permitting people to make wills is a command? In defence of Austin it may be said that, although the law does not command a person to make a will, it does nevertheless command other people not to interfere with the dispositions contained in his will if he chooses to exercise his privilege of making one. From the point of view of a testator, the rule that a man may make a will is admittedly not a command, but, from the point of view of the general public, it certainly is. Nowadays many rules of law are permissive in form, and affect to confer privileges, not to impose duties; but the permissive form should never be allowed to distract attention from the fact that the rule is imperative in its essential character. In the well-known case of *Ashby* v. *White* [29] it was

28. Salmond, *Jurisprudence*, p. 50.
29. 1 Smith L.C. 266.

decided that where the law confers the Parliamentary franchise on persons possessing certain qualifications an action for damages will lie against any one preventing a duly qualified elector from voting. Likewise, what are known as administrative statutes are, in reality, commands, although Lord Bryce gives them as an instance to which Austin's theory is not applicable.[30] Administrative statutes are those which authorise a public body to do something which otherwise it would have no power to do —for example, to impose a new rate. But a statute authorising a borough council to impose a new rate is, from another point of view, a command to the subject to pay the rate. "Though nominally addressed to the council, it is really also addressed to the subject, as he will discover to his cost should he dispute the payment of the rate." [31]

The law of procedure has been put forward as another example which does not tally with the Austinian doctrine. It consists, for the most part, of rules relating to the admissibility of different kinds of evidence, or defining the respective provinces of Judge and jury, or determining the forms to be complied with in bringing questions before the Courts. By themselves these rules can be construed as commands only with the greatest difficulty. It is difficult, for example, to discover the elements

30. *Studies in History and Jurisprudence*, vol. ii. p. 45.
31. W. Jethro Brown, *The Austinian Theory of Law*, p. 339.

of a command in the rule that hearsay is no evidence. But it has been urged in defence of Austin that it is to take too narrow a view of the question to regard every rule by itself. Austin says that every positive law is a command, but there is nothing to shew that he means that every sentence in a text-book or statute or even that every statute is a command. A law consists of many sentences, and may consist of more than one statute. The rule that hearsay is no evidence must not be read alone. It must be read in conjunction with every law to which it relates, and it will then be found that, although not in itself a command, it is nevertheless a fragment of a command. It will be remembered that Austin himself excepted from his definition declaratory or explanatory laws. This, however, is not at all in keeping with his main view. All that is necessary is to read the explanatory law along with the law explained, and it will be found that the two together make a command.[32]

Another of Austin's exceptions consists of repealing statutes. In this case a similar argument has been used to that just applied to explanatory laws. For example, a statute passed in the reign of Queen Victoria prohibits the taking of wild birds during a certain season of the year. Suppose an Act were passed repealing this statute. Some writers would regard the repealing Act as a command to the

32. See *Encyclopædia Britannica*, vol. xiv. pp. 573-575.

public not to interfere with any one taking wild birds during that season. But this view does not coincide with judicial pronouncements on the point. In *Kay* v. *Goodwin*[33] Tindall, C.J., said, "I take the effect of repealing a statute to be to obliterate it from the records of Parliament as completely as if it had never been passed; and it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted and concluded while it was existing law."

Basing his view on this pronouncement, Professor Brown suggests that, from the point of view of English law, a repealing statute should be regarded as having a negative or obliterating effect.[34] In the example given above, it would be more correct to say that there was once, but there is not now, a law against taking wild birds during the close season. In other words, a repealing statute is like a negative quantity in mathematics. When a negative quantity is brought into contact with a positive quantity of the same magnitude the result is zero. In the same way, when the repealing statute and the statute repealed are read together, the one neutralises the other. There is no law on the point, and consequently the question of command does not arise at all.

Austin's theory has been further criticised from the point of view of customary law and Judge-made law. To the customs by which

33. 6 Bingham, 582; 31 R. R. 500.
34. *The Austinian Theory of Law*, p. 339.

men are governed in the infancy of society, it has already been pointed out, Austin's theory was not intended to apply. But even at the present time custom plays an important part in the creation of law. It is a well-settled rule that in the absence of any other law bearing on the case before him a Judge may take a custom, which fulfils certain requirements, and apply it as law. Also, in the course of their duties of interpreting statutes and applying precedents Judges frequently create new law. The critics argue that a rule of law made in either of these ways does not fall within Austin's definition of a command of the Sovereign. But Austin himself points out that a Judge is merely a minister to whom the Sovereign has delegated certain powers, and, so long as the Judge acts within these delegated powers, his acts are in effect the commands of the Sovereign.[35] To this reply is made that it is a misuse of language to say that the Sovereign commands something merely because he has the power to prevent it.[36] But on the behalf of Austin it has been maintained that he does not hold any such view. What Austin says is this: "Whatever the Sovereign permits a Judge to order, and is enforced by the Sovereign when it is ordered, must be taken to have been commanded."[37] That, surely, is not an undue straining of language.

35. *Jurisprudence*, p. 531.
36. See Gray, *Nature and Sources of Law*, § 194.
37. Markby, *Elements of Law*, p. 13.

Constitutional Law has afforded another point of attack for the critics. The rules which make up what is ordinarily understood as Constitutional Law are of two classes. In the first class there are rules which are beyond all doubt laws, and of which the Courts will always take notice. In the second class there are rules of which the Courts will not take any notice at all. Austin, for this reason, said that when we speak of Constitutional Law we mean a compound of positive law and positive morality.[38] Professor Dicey expresses the same view when he says that Constitutional Law consists of two parts—the Law of the Constitution and the Conventions of the Constitution.[39] It is said that the nature of the Conventions of the Constitution is such that they "cannot be refused the name of law by any practical mind."[40] Professor Dicey has shewn that they differ from law in that they have no direct or perfect sanction, but most of them owe their observance to the fact that nobody can break them without sooner or later breaking some rule of law.[41] They have no sanction of their own; they derive their force from the sanction which will be imposed for the course of illegality which is likely to follow their breach. There are some constitutional maxims, however, which have not even this to support them. Those which relate to the com-

38. *Jurisprudence*, p. 267.
39. *Law of the Constitution*, pp. 23-29.
40. Clark, *Practical Jurisprudence*, p. 169.
41. *Law of the Constitution*, ch. xv.

position of the legislative body cannot always be enforced, even by the sanction of future illegality. Yet it is said by some of Austin's critics that even these ought to be called laws, because the test of a law is not its imposition and enforcement by the Sovereign. To decide whether a given rule is or is not a law we must answer two questions:

(x) Would its breach result in "a common feeling of great injustice entertained by a considerable or important number of the community at large—not necessarily a majority"?

(y) And would that portion of the community disobey or resist?[42]

If the answer to both these questions is in the affirmative, then, according to the critics, the rule in question is a law.

But it appears to be a very imperfect and unsatisfactory test to say that something is illegal because it is likely to produce resistance or revolt among a considerable number of the community at large, who regard it as a great injustice. It is equivalent to saying that an Act of Parliament would be illegal if it would be likely to produce this resistance. But no lawyer would admit the truth of such a statement. A rule which has been a great favourite with Austin's critics is the rule that an English statute can only be made by the King, the House of Lords, and the House of Commons. They have said that this rule is a law because an

42. See Clark, *Roman Private Law*, Part II. vol. i. pp. 255-261.

important section of the community would be likely to resist its breach as being a great injustice. Yet we have recently seen that rule infringed. The Parliament Act, 1911, deprived the House of Lords of a considerable amount of legislative power, but neither has it provoked open opposition, nor has its legal validity been questioned. The truth is, that the rule in question is a convention, a maxim of constitutional morality, not a law; and Professor Clark, one of Austin's most formidable critics, has found it necessary to admit that his views require modification.[43]

Lastly, Austin's treatment of International Law has given rise to considerable controversy. It will be remembered that Austin places International Law under the head of Positive Morality along with such objects as the law of honour and the law of fashion. It is said that International Law, in its modern form, is not properly described as positive morality, but is entitled to the name of law. On the other hand, there are writers who support Austin and contend that International Law is not law properly so-called, and that if it be compared with Municipal Law—that is, the law which is applied within the State—it will be found that it lacks many attributes which Municipal Law possesses. Within the State there are a recognised permanent Legislature for making laws, a recognised tribunal for applying them, and

43. See Clark, *Roman Private Law*, Part II. vol. i. p. 155.

recognised sanctions which that tribunal will apply for the purpose of enforcing them. In the realm of International Law there are none of these. Nevertheless, the events of recent years have given indications that they may appear in the future. Since the middle of the nineteenth century several important conferences have been held, at which the rules of International Law have been settled, put into writing, and agreed to by the representatives of the various nations; and these conferences have shewn that periodic meetings for the formulation of new rules are, at all events, within the bounds of possibility. Also, by the Hague Convention, 1899, a permanent Court of Arbitration for the pacific settlement of international disputes was established, and it has heard and settled several important cases.[44] But reference to the Court is not obligatory, and, moreover, it has no means of enforcing its decisions when pronounced. The importance of these matters lies not in their present value, but in the hope which they hold out for the future. There has been a time in the history of every State when the administration of justice consisted in nothing more than invitations to people to forego the settlement of their disputes by fighting, and to have them dealt with by arbitration. The State was in its infancy, and could not enforce its wishes; it could only hold out invitations. Sometimes people accepted

44. See Higgins, *Hague Peace Conferences*, pp. 44-50.

those invitations; sometimes they declined them, and preferred to settle their disputes by resort to arms.[45] This seems to be the point of development which International Law has reached. It has passed beyond the stage of mere morality; it has not yet arrived at the stage of perfect law. "Just as in the history of particular societies there are periods when the differentiation between law and morality is in the process of becoming rather than actually realised—periods when something which is to become positive law is being slowly differentiated from positive morality—so in relation to the society of nations to-day there is a body of rules in which a distinction is being established and developed between rules which are to be obeyed if certain penalties are not to be incurred and rules which are merely the expression of international comity and goodwill."[46] It is, therefore, more correct to describe the body of rules which civilised States have agreed shall bind them as law, but it must always be remembered that "they lie on the extreme frontier of law."[47]

Leaving out of account International Law (which for the present purpose is only of secondary importance), it is possible to give support to Austin's view that every positive

45. See Maine, *Ancient Law*, pp. 383-389.

46. W. Jethro Brown, *The Austinian Theory of Law*, p. 52.

47. Hall, *International Law*, p. 16. For an interesting and apparently practicable suggestion for developing International Law see Keen, *The World in Alliance*.

law is a command. It will be remembered that Austin points out that the commands which make positive laws are commands of a particular type. They are general commands, commands which oblige to acts or forbearances of a class and constrain to a course of conduct. It should be noticed particularly that the course of conduct to which a positive law obliges is a course of external conduct. This is a matter which Austin did not fully elaborate. An injunction is not a command unless it can be enforced, and it is only in the world of outward action that enforcement is possible. Force cannot regulate the state of a man's will; it can only deal with the outward manifestation of his will in action. Rightness of will is a matter of free choice for every man, and the science of Ethics will provide him with rules which will assist him in making the choice. But law can have nothing to do with that choice. The law steps in only when that choice begins to be manifested in outward action. Ethically or morally a man may hold it wrong that he should have to pay a rate for defraying the cost of public education of a type which offends his conscience. The law cannot interfere with his moral conviction so long as it remains a conviction only. "*Cogitationis pœnam nemo patitur.*" But when once he attempts to translate his conviction into action, and to resist payment of the rate, the law comes into operation and obliges him to pay or suffer the penalty. Hence Professor Holland defines a positive law as "a general rule of

external human action enforced by a Sovereign political authority." [48]

Every law, then, is a command which obliges to a course of external conduct. The next question to be discussed is, What is the source of the command? By whom is it issued and enforced? In Austin's view it is issued and enforced by the Sovereign, and by the Sovereign he meant such a body as the Parliament of Great Britain. A law in England is, according to Austin, a command issued by the joint action of the King, the House of Lords, and the House of Commons, and addressed to the people. He has thus given the impression to some people that the Sovereign is external to the community, and that law is the arbitrary creation of the ruling body. This, however, is far from the truth. The Sovereign is an integral part of the organised community or State. A State may be defined as an association of human beings established and organised for mutual advantage and protection. The fundamental purpose of a State is the protection of its members, both against attacks from without and against the attacks of each other. In order that the members of the State may be protected against the attacks of each other, law is necessary to define the limits within which the individual may act without restraint. But before there can be law there must be a law-making body, an organ through which the will of the State can be expressed.

48. *Jurisprudence*, p. 42.

Such an organ is the Parliament of Great Britain, or any other Sovereign in the Austinian sense. Legal theory may accept the declared will of such a body as conclusive of the will of the State, as it does in England. Nevertheless, it ought not to be forgotten that such a body does not speak of its own authority; its commands are really the commands of the organised community of which it is the mouthpiece; and "it seems probable that the jurisprudence of a near future will recognise that the State itself is the true Sovereign, and that such a body as the Parliament of Great Britain should be described, not as the Sovereign, but as the Sovereign organ."[49] The individual, in obeying the law, is not obeying the arbitrary commands of a superior person or body; he is obeying the general will of the corporate whole of which he himself forms part.[50]

Austin's definition has now been modified until it comes to this: Every positive law is a command of the State, obliging to a course of external conduct. It is much better, however, to define not a law, but law in the aggregate, for its true meaning cannot otherwise be fully understood. Particular rules of law should not be regarded as standing by themselves. Nor should they be regarded as belonging to a mass of other legal rules, from which they can be

49. W. Jethro Brown, *Austinian Theory of Law*, p. 286.

50. See Hearn, *Theory of Legal Duties and Rights*, pp. 16-17; Salmond, *Jurisprudence*, pp. 93-99; and Brown, *Austinian Theory of Law*, Excursus A and B.

singled out as a man might pick out a shilling from a heap of coins. They are all inseparably connected with other legal rules, which extend their scope and regulate their meaning and enforcement. They are all part of a greater whole, and they cannot properly be understood except when regarded in connection with that whole.[51] It is necessary to define the whole and not the part, to define law and not a law. By so doing it is possible to get a more correct understanding of the subject, and also to meet the objections of those critics to whom the re-arrangement of the outward form of particular legal rules to make them tally with Austin's definition appears an undignified twisting of words. Law consists of a body of commands of the State, which oblige to courses of external conduct.

But the definition of law as commands must not be taken to mean that force is the only thing which induces men to obey the law. Motives of obedience vary greatly, even with the same individual. A man may obey one law because it is, in his view, a good law, one which serves a useful purpose. That same man may obey another law (which he believes to be a bad one) from a totally different motive, a motive begotten simply by the perception that if he does not obey it he will incur uncomfortable consequences. Lord Bryce[52] sums up the

51. W. Jethro Brown, *Austinian Theory of Law*, p. 332.
52. *Studies in History and Jurisprudence*, vol. ii. pp. 6-26.

grounds or motives of obedience under five heads:

First, there is Indolence, by which he means "the disposition of a man to let some one else do for him what it would give him trouble to do for himself." [53] Most people find it troublesome to exert themselves. They derive very little pleasure from following out Mrs. Chick's advice and "making an effort." This is true both in the world of action and in the world of thought. It is a common thing to adopt the opinion of another person, to admire the rules and institutions which he says are right and necessary. It is far easier to do so than to form an independent judgment.

After Indolence comes Deference, by which is meant any emotion which draws one person to another, and disposes him to comply with the will of that other: any feeling which tends to make one person ready to sacrifice his own impulses to the will of another.[54] Reputed wisdom, for instance, goodness, learning, wealth, rank—will all give to one person, in the eyes of many others, the appearance of one whose views should be adopted.

Thirdly, there is Sympathy, which means "not merely the emotion evoked by the sight of a corresponding emotion in another, but the various forms of what may be called the associative tendency in mankind, the disposition to join in doing what one sees others doing or in

53. *Studies in History and Jurisprudence*, vol. ii. p. 6.
54. *Ibid.* p. 9.

feeling as others feel." [55] It is this disposition, more than any other, which causes men to unite to form social and political communities of all kinds, where they find pleasure in subordinating the individual will and following the dictates of the general will.

Next, there is Fear, which is "a motive acting powerfully upon the ruder and more brutish natures." [56] Fear is the promptest and most effective means of restraining the turbulent or criminal elements in society, and it is the last and necessary expedient in case of insurrection.

Lastly, there is Reason. "Reason teaches the value of order, reminding us that without order there can be little progress; and preaches patience, holding out a prospect that evils will be amended by the general tendency for truth to prevail. Reason suggests that it is often far better that the law should be certain than that it should be just, that an existing authority should be supported rather than that strife should be caused by an attempt to set up a better one. So also reason disposes minorities to acquiesce even where a majority is tyrannical, in the faith that tyranny will provoke a reaction and be overthrown by peaceable discussion." [57] But Reason only guides "the more thoughtful and gentle" minds.[58]

55. *Studies in History and Jurisprudence*, vol. ii. p. 10.
56. *Ibid.* p. 13.
57. *Ibid.* pp. 12-13.
58. *Ibid.* p. 13.

The foregoing are the five grounds or motives of Compliance in general. Obedience to law is a form of Compliance in general, and the same five motives exist for obedience to law. Indolence, Deference, and Sympathy play a far more important part than do Fear and Reason; and Lord Bryce concludes: "in the sum total of obedience the percentage due to Fear and to Reason respectively is much less than that due to Indolence, and less also than that due to Deference or to Sympathy." [59]

All this is undoubtedly true, and the student should never allow himself for one moment to lose sight of the fact. Nevertheless, law is properly described as consisting of commands of the State, because law differs from any other body of rules in that, when all other motives for compliance have failed to secure obedience, the power of the State will be brought into operation to compel obedience. The power of the State is the *ratio ultima*, the force which in the very last resort will secure obedience. Law stands alone in having as its ultimate backing the power of the State, and for that reason it is quite properly described as consisting of the commands of the State.

But although law is the command of the State, it is something more. Besides being the command of the State, it is a growth, and, moreover, a growth of a particular kind. It is not a growth in the purely mechanical sense

59. *Studies in History and Jurisprudence*, vol. ii. p. 13.

of its being the accumulation of the laws of successive ages, like the waste heap at the head of a coal-pit, which has grown by the accumulation of the successive loads of shale which have been deposited there. It is a growth of a totally different kind, the kind which is described as organic. It is the product of slow and gradual, but continuous, development. Speaking of English Law, Sir Frederick Pollock says:[60] "The branches grow indeed, but they have always grown from the same roots; and those roots must be sought for as far back as the customs of the Germanic tribes, who confronted the Roman legions when Britain was still a Roman province and Celtic." The law of to-day is the living outgrowth of the law of yesterday; the law of to-morrow will be the living outgrowth of the law of to-day. This unity of development is obvious in the case of customary law, but it is none the less true in the case of direct legislation. "The most despotic of legislators," says Professor Brown, "cannot think or act without availing himself of the spirit of his race and time. His most despotic laws reveal the importance and potency of that spirit. When they are once promulgated they have to be interpreted and administered; in the process of interpretation and administration the spirit of the legal system, as a whole, will re-assert itself at every stage; between the rule and the legal system vital relations become

60. *The Genius of the Common Law*, p. 8.

established; and if we are to describe the change in the legal system we must call it a growth . . . in the living sense in which we employ the term when describing the developmental processes which are characteristic of organic nature." [61]

Moreover, law is not a growth which is the result of blind forces. It is a growth which has been consciously directed by man towards a definite end. To draw a metaphor from horticulture, it is not a wildflower, but a cultivated plant. Man has directed the growth of law with an ethical or moral end in view. Ulpian, the Roman jurist, defined law as "*ars boni et æqui*" [62] (the art or science of that which is good and equitable). His definition gives no indication at all of the dependence of law on the State, but it is useful because it brings out the ethical element in law, an element which Austin and many English jurists have altogether overlooked. This ethical element is manifested in the language of lawyers. In Latin two words, "*jus*" and "*lex*," were used to denote law, and one of the differences between "*jus*" and "*lex*" lay in the fact that the word "*jus*" had two meanings—an ethical meaning as well as a juridical meaning; whereas the word "*lex*" had a juridical meaning only. "*Jus*" meant right as well as law. "*Lex*" meant law only. This duplication of terms existed because of the double aspect of the

61. *Austinian Theory of Law*, p. 348.
62. *Digest*, I. I. I.

complete conception of law—the ethical aspect and the imperative aspect. From the ethical point of view, law is a rule of right or justice; it is "*jus*." From another point of view, law is a rule enforced by the State; it is "*lex*." "Law arises from the union of justice and force, of right and might. It is justice recognised and established by authority. It is right realised through power."[63] In the English language we have not this duplication of terms. Nevertheless, the ethical element is apparent in many of the words in use. Such words as "right," "wrong," "duty," and many others have two meanings. In ordinary use they have an ethical signification, but in the mouth of a lawyer they have a more restricted meaning, and are used in a juridical sense. The juridical meaning is derived from the ethical, and the derivation indicates that law consists of rules of right or justice adopted by the State. The word "justice" is particularly instructive. To say that a man has not been treated "with justice" is not ordinarily to say that he has been treated illegally. But that there is a very intimate connection between law and justice is apparent from a glance at a few legal phrases. The Courts where the law is administered are Courts of justice. To apply the law is to administer justice. Many of the men who administer the law have the title of "justice." We speak of the Lord Chief Justice, of Mr. Justice X, and so on.

63. Salmond, *Jurisprudence*, p. 458.

All these phrases indicate the very important fact, which is sometimes lost sight of, that law is an attempt—admittedly imperfect, as all human attempts must be—on the part of the State to give effect to the rules of right or justice. The purpose of law is to reconcile conflicting interests by the administration of justice.[64] Law is "not a mere affair of literal precepts, but the sense of justice taking form in peoples and races."[65]

64. See Salmond, *Jurisprudence*, Appendix I.; Miller, *Data of Jurisprudence*, pp. 33 *et seq.*; Clark, *Practical Jurisprudence*, pp. 11 *et seq.*; and Dicey, *Law and Opinion in England*.

65. Pollock, *Expansion of the Common Law*, p. 4.

CHAPTER III.

SOVEREIGNTY.

(*a*) *Definition.*—After defining every positive law as the command of a Sovereign, Austin proceeds to discuss the nature of Sovereignty. By treating his subject in this order he incurs the censure of Sir Henry Maine, who says that the question of Sovereignty ought to have been discussed first, and that the discussion of the Nature of Positive Law should have been undertaken only when the Sovereign, from whom the law proceeds, had been defined.[1] Professor Clark, however, points out that Austin's treatment is logically quite defensible.[2] Austin first defines a law in the widest proper sense of the term—"a rule laid down for the guidance of an intelligent being by an intelligent being having power over him." Positive laws, laws strictly so-called, are one particular species of such rules, and consist only of those which are "set by a sovereign person, or a sovereign body of persons, to a member, or members, of the

1. *Early History of Institutions*, p. 347.
2. *Roman Private Law*, Part II. vol. i. pp. 67-68.

independent political society wherein that person or body is sovereign or supreme." [3] Law strictly so called is thus a species of the genus law properly so called. Positive laws differ from all other laws properly so called in that they are the commands of a Sovereign. Logically, the next thing to do is to investigate the nature of Sovereignty. When that is done the meaning of positive law is completely explained. The process is one of narrowing the issue step by step.

Before actually discussing Austin's definition of Sovereignty it is convenient to remind the reader of the three meanings which may be attached to the word "Sovereign," and to insist that it is only with one of those meanings that he, as a student of Jurisprudence, is concerned. Sometimes the word Sovereign is used in a purely nominal sense to denote the reigning monarch. Thus it is said that George V. is the British Sovereign. This use of the term is purely a matter of courtesy, and with it a student of Jurisprudence has no concern at all. Secondly, the word Sovereign is used in a political sense to denote that body whose will is ultimately obeyed by the citizens of the State. In this sense it has been said that in Great Britain the electorate is Sovereign. But, again, the student of Jurisprudence is not concerned with this use of the term. That which is of importance for purposes of Jurisprudence is the

3. *Ante*, pp. 15-17.

third or legal meaning of the word Sovereign, by which it means that person or body in the State which has the supreme law-making power. In this sense the Parliament of Great Britain (consisting of the King, the House of Lords, and the House of Commons) is Sovereign. And whenever in Jurisprudence the word Sovereign is used without any qualifying adjective, it must be taken in its legal signification.[4]

We now come to Austin's definition. Austin says that Sovereignty and Independent Political Society, which is implied by Sovereignty, are distinguished by two marks or characteristics:[5]

(1) The bulk of the given society must be in the habit of obedience or submission to a determinate common superior, whether that superior be an individual or a certain body of individuals. This he calls the Positive Mark.

(2) The superior person, or body, must not be in the habit of obedience to a determinate human superior. It may render occasional obedience, but it must not render habitual obedience. This is the Negative Mark.

These two marks must, in Austin's view, coincide before there can be Sovereignty or Independent Political Society. Hence he defines an independent political society thus:

If a determinate human superior, not in the habit of obedience to a like superior, receive

4. See Dicey, *Law of the Constitution*, pp. 68-73; and Bryce, *Studies in History and Jurisprudence*, vol. ii. pp. 49-73.

5. *Jurisprudence*, pp. 220-221.

habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent.[6]

The superior is called the Sovereign, and the other members of the society are called the Subjects. An independent political society or, as it is now called, a State, is, according to Austin, a society consisting of a Sovereign and subjects.[7]

Several points should be noticed with regard to both the positive and the negative marks. In connection with the positive mark, the obedience must be habitual and not merely occasional, and it must be rendered by the bulk or generality of the members of the society. It must be the ordinary course of the vast majority of the members, their habitual rule, to render obedience to a superior. And, moreover, that superior must be a common superior, for if some members render habitual obedience to one superior, and others to another, there will be not one society, but two. Again, the common superior must be a determinate superior, because an indeterminate body is incapable of corporate action or of definite conduct, and cannot, therefore, command or receive obedience or submission.[8]

6. *Ibid.* p. 221.
7. *Ibid.* p. 221.
8. *Ibid.* pp. 221-224.

With regard to the negative mark, it should be noticed that Austin allows the superior to render occasional obedience to other superiors; in fact, it is impossible that it should not do so. But it must not be in the habit of rendering such obedience. Such obedience must not be the general rule. Otherwise the society will be not an independent political society, but a subordinate political society. It will possess the positive mark, but not the negative; it will be merely a part of an independent political society.[9]

Before there can be an independent political society, and, therefore, before there can be Sovereignty, there must be a union of both the positive and the negative marks. There must also be a further condition: the society must consist of a considerable number of individuals. It is impossible to fix that number with precision, but Austin insists that it must not, at all events, be so small as to be extremely minute. He points out that a single independent family, all the members of which rendered obedience to its chief, would not fulfil the required condition.[10] This element of numbers, on which Austin insists, is extremely important, because numbers imply organisation, and a State is essentially an organised community. A few men may live together without much organisation, as in the miners' camps which one reads

9. *Ibid.* pp. 225-230.
10. *Ibid.* pp. 231-233.

about in the tales of the early North American gold-diggings. But a large community must be organised for purposes of government; there must be law to reconcile the conflicting interests of individuals and to secure order; Courts are necessary for the purpose of carrying the law into effect; there must be some organisation for military defence, for the collection and expenditure of taxation, and so on. All these, which are well-nigh negligible in the case of a small group, become imperative when the group is large.

There is a further element which Austin omitted, but which most modern writers deem important. It is the exclusive possession and control of a definite tract of territory. The possession of territory is a characteristic feature of all civilised and normal States. Professor Salmond suggests that a State not possessing territory is conceivable, and that a wandering tribe, for instance, might possess all the organisation of a State; but he points out that such instances are so rare that they are, for all practical purposes, negligible.[11] And ordinarily the possession of definite territory is characteristic of a State, while for purposes of International Law it would appear to be essential.[12]

(*b*) *The Delegation of Sovereign Powers.*—Austin points out that every Sovereign (whether

11. *Jurisprudence*, p. 99.
12. Hall, *International Law*, p. 17.

an individual or a body of individuals) always appoints political subordinates or delegates to exercise some of its sovereign powers. For example, he says that in England the electorate, which shares the sovereignty with the King and the House of Lords, delegates the members of the House of Commons. This delegation of sovereign powers, which takes place in every State, may either be subject to a trust or trusts or it may be absolute and unconditional. In England, he says, the electors delegate their powers absolutely and unconditionally to the House of Commons. Parliament, consisting of the King, the House of Lords, and the House of Commons, is omnipotent in English law; it can even prolong its own existence. On the other hand, Austin points out that a body such as the House of Commons may be delegated subject to a trust or trusts. Such a trust might be enforced either by legal or by merely moral sanctions. Then he proceeds, in the face of his previous assertions, and says that the House of Commons is delegated subject to a moral trust. The King, the House of Lords, and the House of Commons are ordinarily regarded as forming a tripartite body, which is sovereign or supreme; but Austin says that, speaking accurately, the members of the House of Commons are really trustees for the electors. There is a tacit trust arising from the relation between the electors, who delegate the members, and the members, who represent the electors, and this tacit trust

is enforced by moral, as distinct from legal sanctions.[13]

These doctrines of Austin contain some curious inconsistencies. First, he says that sovereignty is shared by the King, the House of Lords, and the electors. Next, he tells us that when a House of Commons has been elected, the King, the House of Lords, and the House of Commons are legally omnipotent, because the electorate delegates its powers absolutely and unconditionally. Then he contradicts himself by saying that the delegation is subject to a trust. There are two reasons why Austin becomes involved in these inconsistencies. In the first place, he confuses legal and political sovereignty, and, in the second place, he is reluctant to admit that legal sovereignty can ever be in abeyance. Legal sovereignty under the British Constitution resides in the King, the House of Lords, and the House of Commons. The electors have no share whatever in the legal sovereignty, but, on the other hand, they are politically sovereign. Parliament possesses the supreme law-making power in England, but the electorate is that body whose will is ultimately obeyed by the citizens of the State. When there is no House of Commons—that is, when there has been a dissolution of Parliament, but before a general election has been held—legal sovereignty is in abeyance. This is a point which Austin did not realise, and consequently

13. *Jurisprudence*, pp. 248-248.

he was obliged to make the electors, along with the King and the House of Lords, the repositories of sovereign power. There is only one way in which the abeyance of sovereignty can be avoided, and that is by recognising the State itself as sovereign, and by regarding such a body as the British Parliament as the sovereign organ, the mouthpiece through which the will of the State is expressed.[14]

(*c*) *The Divisibility of Sovereign Powers.*—Austin criticises Blackstone, who divides sovereign powers into legislative powers and executive or administrative powers, legislative powers being those of making laws, and executive or administrative powers being those of administering or carrying into effect laws already made. In Austin's view, this distinction is unsound. Both legislative and executive powers belong in any State to one and the same body, and the only correct division of sovereign powers is into supreme and subordinate.[15] Supreme powers he defines as "the political powers, infinite in number and kind, which, partly brought into exercise and partly lying dormant, belong to a sovereign or State."[16] And subordinate powers "are those portions of the supreme powers which are delegated to political subordinates."[17]

14. W. Jethro Brown, *Austinian Theory of Law*, p. 128; and see Excursus A and B.
15. *Jurisprudence*, pp. 248-252.
16. *Ibid.* p. 251.
17. *Ibid.* p. 251.

It should be noticed that Austin does not deny the difference between legislative and executive functions. He would have admitted that one body might be concerned mainly with the making of laws, while another might be concerned mainly with carrying them into effect; but he maintained that all sovereign powers emanate from one and the same Sovereign. Sovereignty, according to Austin, is indivisible.

For this view Austin has been very severely criticised. "The picture which Austin draws," says Sir W. Anson,[18] "of a Legislature issuing commands, enforced by an executive which in some way may be regarded as a part of the Legislature, is remote from the facts of our own and of most, if not all, modern constitutions. The cohesion and good government of a State depend upon the certainty and promptitude with which law, made by the Legislature, past or present, is enforced by the executive; but this does not mean that executive and legislature are one; rather it means that the law, and those who enforce the law, are alike in accord with the public opinion of the community." He also points out that the executive does other work in addition to enforcing the law, and gives as an example the circumstances attending a declaration of war by this country. The King, acting on the advice of his Ministers, declares war, and Parliament is not informed until it has been

18. *Law and Custom of the Constitution*, vol. i. p. 3.

done. Troops are moved by the order of military officers, for whose action the Secretary of State for War is responsible, and the Secretary of State for War derives his authority from the Crown.

In answer to this, Professor Brown [19] maintains that the King as the head of the executive, although he may possess important powers of initiation, is nevertheless subordinate to the King as a member of the supreme Legislature. An Act of Parliament altering the composition of the executive or depriving it of any of its powers would be perfectly valid. On the other hand, Professor Salmond points out [20] that not only is the King a part of Parliament—he is a part without whose consent no statute can be passed. And he argues: "How, then, can the Legislature control the executive? Can a man be subject to himself? A power over a person which cannot be exercised without that person's consent is no power over him at all. A person is subordinate to a body of which he is himself a member, only if that body has power to act, notwithstanding his dissent." But, Professor Brown urges,[21] legal theory requires that a differentiation should be made between the two capacities in which the King acts. The King in his executive capacity has no part in legislation. If an Act of Parliament were passed altering the constitution of the executive, the

19. *Austinian Theory of Law*, p. 174.
20. *Jurisprudence*, p. 468.
21. *Austinian Theory of Law*, p. 175.

King would have assented to it in his legislative capacity, not in his executive capacity. To the British Constitution, at all events, Austin's view conforms.

It must be remembered, however, that all Constitutions are not like the British. In fact, most foreign Constitutions form strong contrasts to it, for they are rigid Constitutions; that is to say, they are contained in one or more so-called fundamental laws which cannot be changed in the same way as ordinary laws. These fundamental laws usually create (*inter alia*) a legislature, an executive, and a judicature, and by laying down limits within which each must act prevent any one of them from encroaching on the powers of either of the others. In the United States, for instance, the executive, the legislature, and the judicature are independent and equally powerful bodies. Their powers are rigidly defined by the Constitution, and there are many safeguards to prevent any of them from exercising powers belonging to the others. How far does Austin's doctrine of the indivisibility of Sovereignty apply in this case? The powers of government are divided between three distinct and equally powerful bodies. The executive and the judicature are not, as in England, subordinate to the Legislature, and the only argument by which Austin's doctrine can be supported is that all three bodies derive their authority from the Constitution, and therefore the Sovereign is that body which can alter the Constitution.

But this seems an unreal view to take when it is remembered that the body which can alter the Constitution very rarely exerts its powers. In the United States it did not exert itself for fifty-seven years, between 1810 and 1867, and again it has not acted since 1870. "The Sovereign . . . is a despot hard to rouse. He is not like the English Parliament, an ever-wakeful legislator, but a monarch who slumbers and sleeps. The Sovereign of the United States has been roused to serious action but once during the course of more than a century. It needed the thunder of the Civil War to break his repose, and it may be doubted whether anything will ever again rouse him to activity. But a monarch who slumbers for years is like a monarch who does not exist." [22] If any reader, in spite of the foregoing argument, still clings to Austin's view, let him ask himself what the position would be in such a country as the United States if the framers of the Constitution omitted, purposely or by accident, to provide a means for altering the Constitution. Such a state of affairs is quite conceivable,[23] but Austin's doctrine would have no application to it. Sovereignty is not necessarily indivisible. The contrary view propounded by Austin is a generalisation based on the insufficient ground of the British Constitution, to which alone it is applicable.

22. Dicey, *Law of the Constitution*, p. 145. See also Bryce, *Studies in History and Jurisprudence*, vol. ii. pp. 91-93.

23. See Dicey, *Law of the Constitution*, p. 143.

(*d*) *Half-Sovereignty.*—According to Austin, Sovereignty implies habitual independence of all external control, and for this reason he attacks the name Half-Sovereign State as involving a contradiction of terms. A half-sovereign or semi-sovereign State is one which is, to a greater or less extent, subordinate to some other, its sovereignty or autonomy being imperfect by reason of external control.[24] Austin's view is that the name half-sovereign is improperly given to such a State, because every such State is in one or other of three positions. In the first place, it may exercise its powers entirely and habitually at the bidding of the other State, in which case it is not sovereign at all, but is entirely subject. Secondly, the other State may exercise its control only by the express or tacit permission of the so-called half-sovereign State, in which case the so-called half-sovereign State is merely delegating its own legal powers to the other State, and is therefore quite independent and fully sovereign. Lastly, the so-called semi-sovereign State may not exercise its powers entirely and habitually at the bidding of the other State, but at the same time it may not be so completely independent of it that it can be said that the other State only exercises control through its permission. In this case the two States are together sovereign, and the so-called

24. Salmond, *Jurisprudence*, p. 113.

semi-sovereign State is properly described as being jointly sovereign with the other State.[25]

Hence Austin rejects the name half-sovereign State as a self-contradictory expression. Sovereignty, in his view, implies absolute supremacy. "A government of a particular community may be half of the sovereign, but it cannot be half-sovereign."[26] Yet there have existed States which could more properly be described as half-sovereign than by any other term. An oft-quoted instance is that of the United Republic of the Ionian Islands, which was established under the protectorate of Great Britain by the Treaty of Paris, 1815. The head of the Government was appointed by Great Britain, and the whole of the executive government was practically in British control. Moreover, Great Britain was invested with the power of entering into treaties and of making peace and war on behalf of the Republic; but the acts of Great Britain in these matters did not bind the Republic unless it was expressly stipulated that Great Britain had acted in the capacity of protecting Power. On the other hand, the vessels of the Republic carried a separate and independent trading flag, and the Republic could receive, although it could not accredit, consuls.[27] And on these facts it was even held by the English Courts that the

25. *Jurisprudence*, pp. 252-256.
26. W. Jethro Brown, *Austinian Theory of Law*, p. 140.
27. Hall, *International Law*, p. 28.

Republic could remain neutral during the Crimean War.[28]

Professor Brown, while criticising Austin's views in regard to half-sovereign States, still holds that his doctrine of habitual freedom from all external control is perfectly tenable "for the purposes of a jurisprudence exclusively concerned with fully developed States."[29] But it may be doubted whether perfect independence in external affairs, as indicated by Austin's negative mark, is, after all, essential for purposes of Jurisprudence. For purposes of International Law, no doubt, external independence is a question of considerable importance, because International Law is concerned mainly with the external relations of States. But Jurisprudence has to do with the law which is in force within the State, and it would seem, therefore, that the possession of the positive mark is the more essential test for purposes of Jurisprudence, and that a certain degree of dependence in external matters is quite consistent with Sovereignty from the point of view of the jurist. So long as the power of making laws and the power of administering them are exercisable wholly and exclusively by some determinable body within the community, there seems to be all that is strictly necessary, from the standpoint of Jurisprudence, for the complete conception of Sovereignty. For this reason Professor Clark[30]

28. *The Ionian Ships*, 2 Spinks, 212, and 1 Pitt-Cobbet, 55.
29. *Austinian Theory of Law*, p. 143.
30. *Roman Private Law*, Part II. vol. i. p. 154.

suggests that a few additional words should be inserted in the statement of Austin's negative mark so that it would read thus:

The sovereign individual, or the sovereign body of individuals, is not, *in its relation to the subjects*, in the habit of obedience to a determinate human superior.

(*e*) *Legal Limitations to Sovereignty.*—Not only does Austin hold that the Sovereign must be habitually free from external control; he also maintains that the power of the Sovereign within the State cannot be subject to any legal limitations. He points out that every positive law is set by a sovereign person, or sovereign body of persons, to persons in a state of subjection, and he argues that if any supposed Sovereign were under a legal limitation it would be subject to a higher or superior Sovereign which had made the law imposing the limitations, and therefore it would not be sovereign at all. Where a Sovereign is a corporate or aggregate body, individual members of that body may be subject to obligations imposed by the whole, but the sovereign body itself cannot be bound by any legal limitation. Should it attempt to make laws which will bind it in the future, it will fail, because it will always have the power of repealing those laws.[31]

Austin does not deny that there may be practical limitations on the power of a Sovereign, such as those arising from its own moral

31. *Jurisprudence*, pp. 253-279.

character or from fear of disobedience or revolt.[32] He would also have admitted that a Sovereign cannot do things which are physically impossible, and that the fact that it is surrounded by other States must limit its complete freedom of action by causing it to guard against possible attack and to refrain from provocation.[33] But, in Austin's view, although there may be practical limitations to sovereign powers, there can be no legal limitations.

With regard to the British Constitution, Austin's view can be upheld. It follows from the doctrine of the supremacy of Parliament[34] that the Legislature cannot pass a law which will limit either its own power or the power of any future Parliament. An illustration often quoted is that afforded by the Act of Union with Ireland, 1800. That Act laid down that the preservation of the United Established Churches of England and Ireland should be an essential and fundamental condition of the union. Nevertheless, in 1869, by the Irish Church Act, Parliament quite legally disestablished the Irish Church.

It should, however, be remembered that the legal omnipotence of the British Parliament is almost unique. Most foreign Constitutions are rigid. They are contained in certain fundamental or constitutional laws, which limit the

32. See Dicey, *Law of the Constitution*, pp. 74-82.

33. See W. Jethro Brown, *Austinian Theory of Law*, pp. 158-9.

34. See Dicey, *Law of the Constitution*, Part I.

powers of the bodies exercising sovereign authority, and which cannot be changed in the same way as ordinary laws. A strict Austinian would say that the true Sovereign in such a case is the body which can change the Constitution; but such an answer is not very satisfactory when one remembers that the body which can change the Constitution is very rarely active, that often it is very difficult to locate it, and that cases are well within the bounds of possibility in which the framers of the Constitution might omit to make any provision for convening such a body; and by such considerations as these the defender of Austin is "driven into a corner from which he cannot easily escape." [35]

On the same principle Austin holds that the Sovereign cannot have any legal rights against its own subjects, nor can it be under any legal duties towards them. Every legal right is the creature of a positive law, and therefore there must, in Austin's view, be three parties to it —namely: (1) the party bearing the right; (2) the party burdened with the corresponding duty; and (3) a Sovereign Government setting the law through which the right and duty are respectively conferred and imposed. Every party bearing a right has necessarily acquired it through the power of another: therefore, if a Government had legal rights against its own subjects, it would not be sovereign, because its rights would be created by positive laws set by

35. W. Jethro Brown, *Austinian Theory of Law*, p. 164.

a third person or body. On the same argument a Sovereign cannot owe any legal duties to its own subjects. A legal duty is the correlative of a legal right. It is, therefore, the creature of positive law, and implies the existence of a third person or body who has set the law.[36]

But Austin's view cannot be upheld. The Sovereign can have legal rights against its own subjects, and such rights will actually accord with Austin's own definition of a legal right. He says,[37] "A party has a legal right when another or others are bound or obliged by the law to do or forbear towards or in regard of him." According to this definition, if the law provides that when two parties enter into a contract each shall have certain rights against the other, and the Sovereign enters into a contract with one of its subjects, it must acquire legal rights against that subject.[38] Likewise the Sovereign has a legal right to receive payment of the taxes which the law imposes on the subjects.[39] If the law provides that all incomes over 130*l.* per annum shall be liable to income tax, the Sovereign has a legal right to receive payment of the tax from everybody whose income is over that amount. So, too, the subjects may have legal rights against the Sovereign. In the example given above, where the law provides that a contract shall give certain rights to both

36. *Jurisprudence*, pp. 280-290.
37. *Ibid.* p. 398.
38. Salmond, *Jurisprudence*, p. 200.
39. W. Jethro Brown, *Austinian Theory of Law*, p. 193.

parties, a subject who enters into a contract with the Sovereign acquires those rights, and "the right of a holder of Consols is just as much a legal right as the right of a debenture-holder in a public company."[40] Austin would have denied the name of legal right in all these instances because the Sovereign can at any time alter the law conferring the right, and the right is, therefore, held at the pleasure of the Sovereign. But all other legal rights are in the same position: the Sovereign can alter the law conferring them at any time.[41] If the law confers on the subject a claim against the Sovereign, that claim is quite properly described as a legal right, and the corresponding obligation of the Sovereign is quite properly described as a legal duty.

40. Salmond, *Jurisprudence*, p. 200.
41. *Ibid.* p. 201.

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